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IN THE

Supreme Court of the United States

October Term—1952

No. 329

FRANK COSTELLO,

Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

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Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named defendant-petitioner, Frank Costello, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming, in part, a judgment of conviction of the petitioner after a jury trial in the United States District Court for the Southern District of New York.

The judgment of conviction entered on April 8, 1952, was upon ten counts[1] of an eleven count indictment charg-

[1] Count 2 was dismissed by the Trial Court at the close of the Government's case.

ing separate contempts of the United States Senate Crime Investigating Committee in violation of 2 U. S. C. A., Section 192, and for which petitioner received sentences aggregating eighteen months imprisonment and imposition of fines totaling five thousand dollars. The decision of the Court of Appeals was filed on July 3, 1952, reversing conviction on counts 1, 3, 4, 7, 9, 10 and 11 and affirming conviction on counts 5, 6 and 8, which carried the total sentence of 18 months and fines of two thousand dollars.

A petition for rehearing was denied without opinion by the Court of Appeals on August 1, 1952.

Opinion Below

The District Court wrote no opinion. The opinion of the Court of Appeals is not yet reported and is appended hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1) and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether the erroneous submission to the jury of counts 1, 3 and 4 and the Trial Court's erroneous rulings and instructions to the jury that petitioner was not lawfully justified in claiming privilege against self-incrimination so prejudiced the jury in its consideration of counts 5, 6 and 8, as to deprive petitioner of his constitutional right to a fair trial. (Treated in Point I of the subjoined brief.)

2. Whether as a matter of law there could be any contempt where the witness, after his refusal, promptly testified and the Committee was not actually obstructed in its investigation. (Treated in Point II.)

3. Whether defendant was deprived of a fair trial by the erroneous exclusion of certain evidence which constituted strong proof of defendant's good faith and of the absence of wilfulness. (Treated in Point III.)

4. Whether a prosecution of a witness for contempt in wilfully refusing to testify is authorized under 2 U. S. C. A. Section 194, where the Senate resolution and certification limited the finding of contempt to the refusal of the witness "to answer certain questions". (Treated in Point IV.)

5. Whether the sentence imposed was in excess of the penalty provided in 2 U. S. C. A., Section 192. (Treated in Point V.)

Statutes Involved

2 U. S. C. A. §§192 and 194 (R.S. 102 and 104, as amended by the Act of June 22, 1938, 52 Stat. 942) provide as follows:

> §192: "*Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question

pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

§194: "*Witnesses failing to testify or produce records.* Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned, refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

Statement

The contempt charges arose out of petitioner's appearance as a witness before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce.

Indictment

The indictment contained eleven counts charging separate offenses under 2 U. S. C. A. §192. Count 1 charged petitioner with his refusal on March 13th, 1951 to answer a question concerning his net worth. Counts 2 (dismissed by Trial Court), 3 and 4 were based upon petitioner's refusal on March 21st, 1951 to answer questions as to his liabilities.[2]

Count 5 charged wilful default on March 15th, 1951, by the termination of petitioner's attendance before the Committee and his departure without leave.[3] Count 6 charged a wilful default in petitioner's refusal to give any testimony on March 15, 1951. Count 7 charged a refusal to answer a question on March 15, 1951, as to whether petitioner was familiar with testimony given the preceding day by one McLaughlin.

Count 8 charged a wilful default in the refusal of petitioner to give any testimony on March 16th, 1951, while Counts 9, 10 and 11 were based upon petitioner's refusal on March 16th to answer questions as to whether he knew William O'Dwyer, James Moran and Frank Bals.

Decision of Court of Appeals

The judgment of conviction on Counts 5, 6 and 8 was affirmed. The conviction on Counts 1, 3 and 4 was reversed on the ground that the petitioner's claim of privilege against self-incrimination was justified and should

[2] The refusal of the petitioner to testify concerning his net worth and liabilities was based upon a claim of privilege against self-incrimination.

[3] The refusal of the petitioner to give testimony on March 15th and 16th (covered by Counts 5 to 11, inclusive) was based upon his claim of illness, because of which he requested and was refused an adjournment of his examination

have been sustained. The conviction on Counts 7, 9, 10 and 11 was reversed on the ground that the contempts involved a multiplication of the refusals to testify, as charged in Counts 6 and 8.[4]

The Facts Concerning Petitioner's Appearances Before the Committee

(Particularly Applicable to the Affirmed Counts 5, 6 and 8)

In response to subpoena petitioner appeared before an Executive Session of the Committee on February 13th, 1952, and testified for two hours. At the outset he was assured that the Committee was well aware of his claim of having been "misrepresented" (as to his true role in society) and that "the purpose of a detailed examination privately" was to give him "every opportunity to establish" his claim (R. 321). At the request of the Committee he returned to an Executive Session on February 15th and testified for six hours, at the conclusion of which he was complimented by counsel of the Committee for having "cooperated" and by the Chairman for "answering most questions forthrightly" and then excused (R. 321).

Pursuant to the request of the Committee petitioner appeared at a public hearing on March 13th, testified for more than six hours, returned to testify on March 14th for three hours and was instructed to appear on March 15th. During his testimony of March 13th and 14th, petitioner answered all questions, except one on March 13th as to his net worth.[5]

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[4] Application for rehearing was duly made to the Court of Appeals, based on Question 1, *infra*, and denied on August 1, 1952.

[5] Senator O'Conor, Acting Chairman, at the conclusion of the March 13th session said, "Here it is, 28 minutes of 6 and he has been on the stand from some time after the beginning of the session of 9:30 this morning, and the only reason I mention those times is to indicate that he has answered a great number of questions and has refused to answer only one" (R. 322-323).

A few days before petitioner's first public appearance on March 13th, the Committee was advised by petitioner's counsel that petitioner was suffering from a severe case of laryngitis but no request was made for an adjournment at that time (R. 322). When petitioner appeared on March 15th, his counsel informed the Committee that petitioner's throat condition was worse, that he was physically and mentally exhausted from the strain of his lengthy questioning of the two preceding days and counsel then made a request for an adjournment until such time as petitioner could properly continue (R. 323-337).

In support of the claim of illness, a certificate of a physician, Dr. Panettieri, bearing date of March 15th, was presented, which stated that he had examined the petitioner that very day, found that he was suffering from an "acute laryngo-tracheitis" and recommended that he "should remain in bed and have complete voice rest for several days" (R. 334-335). The Committee ruled that the certificate failed to show that petitioner was "in danger of any permanent impairment of his health" and directed him to testify (R. 335). Petitioner refused to testify stating that he would not do so until he was well enough; that he was thinking of his "health", wanted "to protect himself" and said further, "When I testify, I want to testify truthfully and my mind don't function" (R. 334).

Acting upon the direction of the Committee, petitioner again appeared on Friday, March 16th. A request was then made for an adjournment until the following Wednesday and in support of this application petitioner submitted a certificate of another physician, Dr. Quick, who had examined the petitioner that morning and which stated:

> "Mr. Frank Costello has had a heavy cold and a laryngitis for nearly two weeks. During this week the laryngitis has gotten steadily worse until he is now unable to talk in sustained conversation and

> any effort in this direction will cause further and continuing danger to larynx * * * but he has been having local and general treatment for ten days—this includes penicillin and aureomycin. Mr. Costello has had a severe throat affliction for which I have treated him over a period of nearly 18 years (R. 340-341).[6]

Again the request to adjourn the examination was denied and the witness was directed to testify despite his assertion, "I don't feel I am fit to answer questions today and answer them truthfully and sensibly" (R. 344). The Committee then asked for and obtained the consent of petitioner to be examined by a physician appointed by the Committee (R. 344).

At the close of that session petitioner was instructed to "continue under subpoena" and counsel for petitioner was informed that he would be advised concerning the arrangements for the medical examination of the petitioner (R. 345).

The following day, Saturday, March 17th, the Committee's physician, Dr. Kernan, examined petitioner and reported by letter that he found no evidence of "acute infection" but that the larynx showed evidence of a "previous extensive disease of the left side", that "this side

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[6] On the trial Dr. Quick testified that the severe throat affliction was cancer of the larynx which he had removed by intensive radiation treatments, the result of which was to leave petitioner a victim of chronic laryngitis (R. 72-74). Although Dr. Quick testified that he had informed petitioner that he could testify for one or two hours, he stated that the larynx showed "some bit more swelling than before and the patient obviously tired, so that the throat looked and, I dare say, felt worse than formerly" (R. 83) and that he found the throat "pretty sharply inflamed" (R. 85). He finally admitted that he had then told the petitioner, "that he had been using his voice too much and I stressed that because with the amount of inflammation present, I was fearful of the possibility of having to put a tracheotomy tube in his neck" (R. 97-98).

of the larynx moves poorly" that "there would be a more than normal strain for this man to talk for long periods" but that he could testify for a reasonable length of time, "such as two hours" (Government's Exhibit 12, p. 10092, original record).[7]

On Monday, March 19th, petitioner appeared before the Committee and resumed his testimony, in the course of which he answered all the specific questions which he had declined to answer on March 15th and 16th (R. 346-348). He continued to testify on March 20th and 21st until finally excused by the Committee. On these last three days he answered all questions, except those relating to net worth and liabilities, on which he persisted in his claim of privilege against self-incrimination.

On March 30, 1951, pursuant to 2 U. S. C. A. §194, the Senate passed Resolution 110 (Defendant's Exhibit K, R. 354, which reads:

> "RESOLVED, That the President of the Senate certify the report of the Special Committee To Investigate Organized Crime in Interstate Commerce of the United States Senate as to the refusal of Frank Costello to answer certain questions in response to subpena duly issued, before the said special committee, together with all the facts in connection therewith, under the seal of the United States Senate, to the United States attorney for the southern district of New York, to the end that the said Frank Costello may be proceeded against in the manner and form provided by law."

[7] As a witness on the trial, Dr. Kernan testified that he was unaware of petitioner's case history except that he knew of the previous cancerous condition (R. 113, 115). He stated that he did not know that the petitioner had considerable voice rest on March 15th and 16th (R. 113-114) and admitted that if the throat showed signs of inflammation and there was evidence of acute laryngitis he would not have permitted petitioner to testify (R. 115).

The report of the Special Committee of the Senate attached to this Resolution, charged in relevant part:

> "as a result of said Frank Costello's refusal to answer the questions pursuant to said inquiry * * * the Committee was prevented from receiving testimony and evidence concerning the matter committed to said Committee in accordance with the terms of the subpena served upon this witness", and that the "Committee was therefore deprived of answers to questions pursuant to the Committee's inquiry * * *", and that the petitioner's "persistent and illegal refusal to answer the aforesaid questions deprived the Committee of necessary and pertinent testimony and places this witness in contempt of the United States Senate".

Attached to the report was a transcript of the proceedings before the Committee relating to the questions involved in all counts.

Reasons for Allowance of Writ

The basic reasons which petitioner urges for the allowance of certiorari are coextensive with the questions presented above and treated fully in the subjoined brief.

The Court of Appeals accepted some of petitioner's points and rejected others, although the latter—to say the least—were fairly arguable and not free from difficulty. Indeed, the first question here presented arises in direct consequence of the ruling of the Court of Appeals that there was no basis to the charges contained in several of the counts, and yet these charges were submitted to the jury by instructions equivalent to a directed verdict of guilty, with ineradicable prejudicial impact.

The multiplication of Congressional activity and the enlarged scope of legislative committee hearings operate to

confer increasing importance upon questions relating to the rights and liabilities of witnesses and the proper administration of justice in connection therewith. An authoritative clarification of the applicable law is desirable, particularly with regard to the substantial questions herein presented.

Petitioner cannot forbear mentioning that he has been subjected to a mass of adverse publicity, which, notwithstanding its utter lack of pertinence to the subject-matter of the prosecution, has undoubtedly militated against the likelihood of a fair trial. The feeling is inescapable that his conviction is the outgrowth of extraneous prejudice and not of the evidence proved against him. A dispassionate consideration of the case leads to the inference that a determination to convict him, of whatever offense and in whatever fashion, permeated and infected the proceedings at virtually every stage. It is scarcely imaginable that the result would have been the same if the individual involved were obscure, unknown or one other than your petitioner.

A background such as this gives added weight and cogency to the arguments advanced in support of the writ, especially those under Questions 1 and 3; where in Question 1 it is claimed that petitioner was deprived of a fair trial by erroneous instructions of the most prejudicial character and where in Question 3 petitioner was deprived of a fair trial by erroneous exclusion of evidence of vital importance in proving his innocence.

It is submitted that the most favorable view to be taken of the Government's case is that it is a close or doubtful one. Petitioner urges that sedulous care should be used to ascertain whether any of his important rights has been withheld or prejudiced, and whether those rights were adjudicated with the same degree of impartiality due to all persons standing before the tribunal of justice.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of the said Court of Appeals in so far as it affirmed judgment of conviction on counts 5, 6 and 8 of the indictment be reversed; and that the petitioner may be granted such other, further and different relief as may seem proper.

Dated: Lewisburg, Pennsylvania, Setpember 10, 1952.

FRANK COSTELLO,
Petitioner.

By GEORGE WOLF,
Attorney for Petitioner.

IN THE

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No.

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Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

BRIEF IN SUPPORT OF PETITION

POINT I

The evidence adduced, the arguments advanced by the prosecution and the language of the instructions with respect to the several counts of the indictment, the conviction of which was reversed by the Court of Appeals, so clearly prejudiced the defendant in the jury's consideration of the three affirmed counts, as to necessitate a reversal and new trial as to them.

This is a point which arose in consequence of the decision rendered by the Court of Appeals, which affirmed as to counts 5, 6 and 8, while reversing as to counts 1, 3, 4, 7, 9,

10 and 11. The conviction on the latter counts was properly reversed for the reason that the Court of Appeals determined that defendant had been acting within his constitutional rights in refusing to answer the questions set forth in counts 1, 3 and 4, while counts 7, 9, 10 and 11 were merely cumulative, representing multiplied charges of more general acts, not independently punishable.

Particularly as to counts 1, 3 and 4, defendant was gravely prejudiced by the erroneous submission to the jury of the evidence, instructions and arguments which were later held by the Court of Appeals to have no proper place in the proceedings. The Trial Court refused to dismiss these counts but submitted them to the jury with specific instructions that it had overruled the claim of constitutional privilege. This charge made a powerful impression on the jury, for they requested further enlightenment on the point (R. 305). In response (R. 306), the Trial Court instructed them that they were bound to accept the ruling that as a matter of law the claim of constitutional privilege had not been legally or properly asserted and that it had no basis in law.

The position taken by the Court was tantamount to a direction of a guilty verdict on counts 1, 3 and 4. Under the law as given to the jury by the Court and which they were bound to follow, they had no alternative but to convict on those counts. Yet those counts were improperly before the jury, as the Court of Appeals correctly held. Therefore, when the jury approached consideration of the sustained counts, defendant stood before them as an individual already adjudged guilty on counts 1, 3 and 4, with the inevitable prejudice inherent in that status.

The integration of the ten counts in the instructions rendered it virtually impossible for the jury to consider the sustained counts without being prejudiced by the sub-

ject matter of the reversed counts.[8] Although they were admonished in the same supplemental charge not to consider his claim of immunity against him, this Court has clearly indicated that prejudicial effects cannot be overcome by such instructions. See concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States,* 336 U. S. 440.

The assertion of privilege was advanced by defendant as a reason for his refusal to testify. The erroneous instructions inevitably tied in the claim of privilege with the issue of good faith involved in the sustained counts, namely, 5, 6 and 8. Thus, when the Trial Court was charging as to those counts (R. 292-293), the jury was told that it was bound to *"give consideration to the reasons given by the defendant for his acts, as well as the entire testimony of the defendant before the Committee, and the entire proceedings of the Committee which were had before the defendant."* Then the Court stated, *"You must give consideration to these as bearing upon his good faith."* Under the foregoing circumstances it is patent that the jury had no alternative but to weigh what they were told was an unlawful claim of privilege as one of the factors entering into their determination of the cardinal issue of good faith.

If the trial had been limited to counts 5, 6 and 8, the Government would not have been entitled to show any matters pertinent solely to the reversed counts. Proof of

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[8] At the trial, counsel for defendant—recognizing the prejudice engendered by the injection of this erroneous issue—objected in vain to the introduction before the jury of the net worth and liability questions and defendant's claim of privilege as to them, stating (R. 159):

> "Mr. Spence: My basis of objection, sir, is that putting this before the jury creates bias by reason of the fact that the jury are then informed that the witness raised his constitutional privilege on the ground that his answer might tend to incriminate him. I think it is almost impossible for a jury to sit without being prejudiced by the fact that this witness has said that certain evidence might tend to incriminate him."

other crimes was obviously inadmissible (*Boyd* v. *United States,* 142 U. S. 450), and *a fortiori* full proof tending to show a number of other acts on the theory of criminality, —acts which later by force of judicial determination turned out to be no crimes at all,—was likewise reversible error. The jury's attention could not be diverted from these matters, for it was part of their duty and function to resolve the issue of defendant's guilt and to render a verdict accordingly. It is impossible to conceive how the jury ignored and was not influenced by testimony bearing upon alleged independent crimes when it was obliged to render a verdict with respect to those identical accusations. Nor was such prejudice created only by the Trial Court's erroneous instructions and introduction of evidence. Pointed reference to the damaging subjects were made in the opening address on behalf of the Government (R. 11)—which stressed defendant's "illegimate businesses" and "criminal friends and associates"—and the summation by the prosecutor (R. 283)—wherein the same subjects were emphasized and the harmful statement made that the defendant was "stunned by the very thought of where a detailed cross-examination along those lines might lead". The Court of Appeals in its opinion stressed "the obvious income tax implications of the questions asked"—a subject sufficient of itself to arouse hostile feelings against any defendant. If these are all matters not germane to the sustained counts and therefore of a sort to which reference could not be lawfully made on the trial involving only the sustained counts, the affirmance of a conviction, procured in measurable part by the introduction of this incurably prejudicial mass of extraneous matter, certainly should not be permitted to stand.

The adjudged misconduct of the defendant in unlawfully asserting constitutional claim of privilege against self-incrimination could not be separated in the minds of the jury from the defendant's conduct in refusing to testify

and in seeking an adjournment upon a claim of ill health. The erroneous instructions, the harmful evidence and the improper argument served to implant a single, cohesive and indelible effect which precluded a separate fair consideration of the only questions which the jury were entitled to consider. The impact of the prejudicial matter was of necessity so powerful as to impress upon the minds of the jury a persistent image of the defendant as an individual who contemptuously flouted the authority of the United States Senate by his unlawful and unjustified conduct. Since this issue was involved in the *first* three counts and was the *first* to be submitted for consideration to the jury, the prejudicial picture of the defendant was fully and completely developed and sharply defined in the minds of the jury before it entered upon a consideration of his guilt or innocence on counts 5, 6 and 8.

No extended argument is necessary to demonstrate that this was peculiarly a case which the jury should have endeavored to decide, unaffected by improper evidence, arguments, instructions or innuendoes. A meticulous regard should have been had for the traditional safeguards inherent in a fair trial which is the constitutional right of every person accused of crime, regardless of his station in life or his character.

The presumption of prejudice which this Court so emphatically asserted in *Kotteakos* v. *United States,* 328 U. S. 750 and *Krulewitch* v. *United States,* 336 U. S. 440, is eminently applicable herein, for the error may not be considered harmless if upon a consideration of the record the Court entertains a doubt as to whether it influenced the verdict. The law is established, in both civil and criminal cases, that an error affecting but one cause of action or one count may require a new trial as to the others where the jury may have been prejudicially affected or where the ends of justice are served. *Newman* v. *Lynchburg Investment Corp.,* 236 U. S. 692; *People* v. *Mullens,* 292 N. Y. 415;

People v. *Rosenberg,* 293 N. Y. 16; *Commonwealth* v. *Wadley,* 169 Pa. Superior Ct. 490; *Commonwealth* v. *Dyer,* 243 Mass. 472; *People* v. *Gaul,* 233 Ill. 630; 66 C. J. S. 90; 24 C. J. S. 1114. A strong analogy is afforded by the familiar rule as to proof of other crimes. If a mere allusion to a different offense under circumstances where such reference is unauthorized may impair the legality of a conviction, plenary proof of other supposed crimes which are subsequently adjudged to be no crimes at all, must surely be deemed even more damaging.

POINT II

Defendant's refusal to testify on March 15th and March 16th did not in fact obstruct the Committee's inquiry, for promptly thereafter he furnished all evidence sought from him. Consequently, as a matter of law his conduct did not constitute contempt.

Where there is no obstruction, there can be no contempt under 2 U. S. C. A. Section 192. *United States* v. *Bryan,* 339 U. S. 323; *Re Michael,* 326 U. S. 224, 227; *Ex parte Hudgins,* 249 U. S. 378. Since there was a total absence of obstruction the sustained counts (5, 6 and 8) should have been dismissed as a matter of law.

The facts concerning defendant's appearances—stated below in chronological order—show not only complete absence of obstruction on his part, but on the contrary, demonstrate an unusually scrupulous compliance with and respect for the Committee's lawful orders.

On February 13th and 14th defendant testified before the Committee at executive sessions for a total of over eight hours, receiving the commendation of the Committee's chairman and counsel for "answering most questions forthrightly" and for having "cooperated".

On *Tuesday,* March 13th, and *Wednesday,* March 14th, defendant testified at public hearings for a total of more than nine hours, answering all questions except one on March 13th as to his net worth.

On *Thursday,* March 15th, defendant attended the session but refused to testify because of his illness, submitting a physician's certificate and requesting an adjournment until able to testify, and his request for such an adjournment was denied. He declined to answer the specific question as to whether he was acquainted with the testimony of one McLaughlin, which testimony had been given on the preceding day.

On *Friday,* March 16th, defendant again appeared before the Committee at its direction, sought an adjournment until the following Wednesday because of his illness and submitted another doctor's certificate in support of his application. He refused to answer three questions directed towards ascertaining whether he knew William O'Dwyer, James Moran and Frank Bals. At the request of the Committee he consented to submit to an examination by a physician of its choice. At the close of the session defendant was instructed to "continue under subpoena", and his counsel was informed that he would be advised concerning the arrangements for the medical examination.[9]

On the following day, *Saturday,* March 17th, the examination by the Committee's physician actually took place, and he found that there was no evidence of "acute infection" but that the larynx, which showed signs of previous

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[9] It is significant that the Court of Appeals in its opinion concluded that "defendant was excused from the hearing" of March 16th. This conclusion was justified not only by the evidence, but by the failure of the indictment to include the contempt charge based upon a wilful termination of defendant's attendance and departure "without leave" on March 16th—as was done in Count 5 which charged a wilful termination of attendance and departure "without leave" on March 15th.

extensive disease (cancer), moved poorly; and that defendant could testify for a reasonable length of time such as two hours, but no more, without strain.

After having had the benefit of voice rest since March 14th, the defendant on *Monday* through *Wednesday,* March 19th, 20th and 21st, resumed the witness stand and answered all questions, including the four specific questions which he had refused to answer on March 15th and 16th[10] (except the questions relating to his net worth and liabilities).

Thus it is apparent that the Committee was neither obstructed nor impeded, for it elicited from defendant all of the information it desired and without undue delay; and as Counsel for the Committee said in his testimony on the trial (R. 139):

> "Mr. Lane, may I add that I have answered that on the assumption that later on the Committee got the information. If the Committee had not gotten the information at all, it would have impeded its work because the particular information asked for in the questions was pertinent to the proceedings and the Committee needed that information. With-

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[10] The four specific questions were asked by Senator O'Conor and answered by the witness on March 19th, whereupon Committee counsel stated (R. 348), "I take it those are the questions that the witness had previously refused to answer," to which Senator O'Conor replied, "That's correct."

The intent of the Committee to afford defendant an opportunity to answer the questions appears in the minutes of March 20th (R. 349):

> "Senator O'Conor: Very good. Well, Mr. Wolf, it will be recalled that this Committee afforded Frank Costello yesterday the opportunity to answer questions which previously had been propounded, except in this one particular (net worth), if my memory serves me correctly * * * That is the best of my recollection, at least; and it was my intention to do so. This question was not asked (net worth), and the reason it is repeated now is that he may have such an opportunity."

out the information, the Committee could not complete its work in connection with the investigation of Frank Costello and crime in New York City."

The conclusion is irresistible that had defendant yielded to the importunity of the Committee to supply answers to questions as to which he was adamant in his assertion of privilege, he never would have been prosecuted for contempt.[11]

POINT III

The Trial Court committed reversible error in excluding (1) evidence of defendant's subsequent attendance at hearing and answering all proper questions, as well as the Committee's attitude showing absence of obstruction, and (2) the actual testimony of Dr. Panettiere before the Committee with regard to the defendant's physical condition; all of which were pertinent on the issue of intent and good faith.

Under 2 U. S. C. A. Section 192, wilfulness is an essential element of the crimes charged in the sustained counts (5, 6 and 8). This requirement was recognized by the indictment's allegations in each of these counts that the conduct of the defendant was wilful: *Count 5*—that on March 15th defendant "did wilfully make default in that he terminated his attendance before the Committee and departed from its presence without leave", *Count 6*—that on March 15th defendant "did wilfully make default in that he refused to give any testimony whatever pursuant to the question under inquiry" and *Count 8*—that on March 16th defendant "did wilfully make default in that he refused to give any

[11] Ample support for this conclusion is found in the opinion of the Committee's chief counsel attached to the Report, wherein the entire legal advice is devoted to negativing the validity of the claim of privilege (Defendant's Exhibit K, R. 420-421).

testimony whatever pursuant to the question under inquiry." The necessity for a jury-finding of wilfulness as an indispensable condition for a guilty verdict on these three counts was stressed in the instructions of the Trial Court to the jury (R. 292, 301). Consequently, after a jury had determined that the defendant's conduct was not wilful and that he acted in good faith, such finding would have negatived the existence of any intent to obstruct.

Nevertheless, in two instances the Trial Court erroneously excluded evidence which not only had a strong bearing on the issue of intent to obstruct, but if admitted, would have done much toward the establishment with the jury of the good faith of defendant's conduct and his freedom from wilfulness.

(1) The first of these errors relates to the exclusion of evidence dealing with defendant's prompt return to the hearing on March 19th, when the Committee informed him that it intended to give him an opportunity of answering the four questions unanswered on March 15th and 16th and when the defendant availed himself of the opportunity to answer those questions (R. 129-130). On March 19th, at the commencement of the hearing, the Acting Chairman of the Committee announced (R. 346-347):

> "At the conclusion of the hearing the other day, March 15th and 16th, certain questions were asked of the witness, Frank Costello, which the committee would like to have repeated at this time.
>
> • • • • •
>
> "Well, Mr. Wolf, I might say, just in explanation for the reason for propounding the question again, that it is our viewpoint that it might be only fair to afford to the witness the opportunity of making any explanation he desires to make, either to answer the question categorically and then offer any explana-

> tion he desires, and it really is with a view to giving him the opportunity that that question is asked."

Then the same four questions that were asked of the witness on March 15th and 16th were repeated and were all answered (R. 347-348). After the witness had answered all of these questions, the following colloquy occurred between the Chairman and Committee's counsel (R. 348):

> "Mr. Halley: I take it, those are the questions that the witness had previously refused to answer?
> Senator O'Conor: That's correct."

The acquiescent attitude of the Committee toward the witness' conduct of March 15th and 16th was again exhibited on March 20th (R. 349):

> "Senator O'Conor: • • • Well, Mr. Wolf, it will be recalled that this committee afforded Frank Costello yesterday the opportunity to answer questions which previously had been propounded, except in this one particular, if my memory serves me correctly.
> Mr. Wolf: That's right.
> Senator O'Conor: That is the best of my recollection, at least, and it was my intention to do so."

The excluded evidence constituted strong proof of good faith and absence of any intent to obstruct and should have been received. In view of the witness' declared purpose to obtain merely a brief adjournment and to resume his testimony when he was physically able, the facts involved in the excluded proof were of extreme importance. They would have furnished a concrete demonstration of the honesty and good faith of the defendant's expressed intention to return.

In *U. S.* v. *Matot* (CCA 2, 1944), 146 F. 2d 197, the Court considered the admissibility of later declarations of

the defendant as to his intention to make good overdrafts in a prosecution charging wilful misapplication of Federal Bank funds in violation of 12 U. S. C. A. Section 592. The Court of Appeals reversed the conviction, holding the declarations to be admissible as evidence of good faith and absence of wilfulness. The Court, in an opinion of Learned Hand, Cir. J., used language that is quite applicable to the instant case, stating at page 198:

> "It is of course possible that the offer indicated only a change of heart, an effort to avoid the consequences of what he had done; but it was also possible to take another view and read it as confirmation of his denial that he had ever contemplated a fraud, and that he was ready to go to lengths to protect the bank."

There were more impelling reasons for reversal in the instant case than in the *Matot* case, for in the instant case the expressed intention to return as a witness was made at the time when the contempt is alleged to have been committed and could not be regarded as an afterthought as might conceivably be the situation in the *Matot* case. Moreover, while in the *Matot* case the excluded proof consisted of a bare belated declaration of good faith, the instant case involved an *earlier* expression of good faith followed by the timely performance of acts which substantiated and attested the truthfulness of the earlier declarations.

(2) Likewise the Trial Court erroneously excluded other evidence that had an important bearing on the question of the good faith of the defendant's reasons for refusing to testify. Dr. Panettiere's certificate was submitted by the defendant on March 15th and stated that he had examined the defendant on that day and had found him suffering from an "acute laryngo-tracheitis" and recommended that he "should remain in bed and have complete voice rest for several days".

Counsel for the Committee in his testimony on direct examination on the trial stated that on March 16th the defendant was told by counsel for the Committee or its Chairman that Dr. Panettiere had given testimony before the Committee to the effect that the defendant "could testify in an ordinary tone of voice for limited periods of an hour or so without threat to his health" (R. 41) • • • "and that while he had advised him in general to rest, he could so testify under those conditions without harm" (R. 42). The effect of the testimony of counsel for the Committee was to cast considerable doubt on the good faith of defendant's conduct. This testimony tended to reflect upon the validity of Dr. Panettiere's diagnosis and his prescribed treatment, as set forth in his certificate of March 15th. By this testimony, the defendant was portrayed as an individual who had resorted to fraud by the submission of a certificate which he knew was false.

In truth, the actual testimony of Dr. Panettiere before the Committee was at variance with the testimony given by Counsel for the Committee upon the trial. Dr. Panettiere's testimony did not reflect upon, but rather supported the original findings set forth in his certificate. It did not justify the assertion that the defendant could *testify* for limited periods without injury to his health. In his Committee testimony (Deft's Ex. F for Id., R. 350-352) Dr. Panettiere reiterated his medical findings and his prescribed treatment of bed and voice rest for several days. He was not interrogated at all as to the defendant's ability to *testify*. In fact, it would seem that reference to any possibility of defendant's being able to testify was scrupulously avoided. The only testimony as to the ability of the defendant to use his voice was contained in the following (Deft's Ex. F for Id., R. 352):

> "Mr. Halley: Did you order him to stay in bed?
> Dr. Panettiere: I ordered bed rest and voice rest for him for several days.

Mr. Halley: Now, Doctor, in your opinion would he be able to talk for a reasonable period, say, of an hour or so, in an ordinary conversational voice, without undue risk?

Dr. Panettiere: If he didn't put any strain on his larynx, yes.

Mr. Halley: And if he had urgent business requiring him to talk in a reasonable conversational voice for reasonable periods, would you consider that he to postpone [sic] that urgent business?

Dr. Panettiere: I don't believe so."

Defendant's offer of a transcript of Dr. Panettiere's testimony was rejected (R. 125-126, 128, 161, 183-184). Defendant was deprived of a fair trial by the exclusion of this testimony. Apart from any question of its value as proof upon the recollection or veracity of counsel for the Committee, it bore directly on the vital question of intent to obstruct and wilfulness. Without such evidence, the defendant's position of good faith was seriously imperiled, if not destroyed. Only with such evidence could the jury have viewed his conduct in the proper perspective.

The Committee's decision overruling the defendant's request for an adjournment on the ground of ill health was predicated in large measure upon its misinterpretation of Dr. Panettiere's testimony. Had the Committee correctly interpreted the import of the testimony it is fair to assume that it would have reached a different conclusion. In any event, the transcript of testimony should have been admitted as having an important bearing on the question of the absence of obstruction as a matter of law, as well as upon issues of fact.

The Court of Appeals in its opinion justified the exclusion of this evidence on the ground of hearsay, and stated "there was no showing that the doctor was unable to testify at the trial". But the Court obviously overlooked the fact

that the testimony of Dr. Panettiere had been incorrectly described by the principal witness for the Government and that the purpose of its introduction was to correct the manifestly erroneous interpretation of it and to remove the false, damaging and prejudicial impression the misdescription necessarily must have made.

The testimony was not offered nor was it admissible to prove the *truth* of its statements; it was intended as proof of its *contents*. Simply put,—the matter in dispute was as to whether or not Dr. Panettiere's testimony was what Committee's counsel said it was. To determine that fact there could be no better evidence than the actual testimony itself. The availability of Dr. Panettiere as a witness—as indicated in the opinion of the Court of Appeals—could not render the transcript of his testimony inadmissible hearsay. For, if the transcript of Dr. Panettiere's Committee testimony was hearsay, the same criticism (of hearsay) could be leveled at his testimony upon the trial.

There can be no doubt that the transcript should have been received as the most accurate evidence of the testimony. No objection was made to its competency. In fact, the authenticity of the transcript was not disputed but was expressly admitted by counsel for the Committee (R. 125). The only objection and the ground for its exclusion were "that it was not the best evidence" (R. 126).

The objection to the transcript of Dr. Panettiere's testimony as not constituting the best evidence was, of course, untenable. It has been held that when an issue arises as to what was testified in another proceeding, the reporter's transcription constitutes "the best evidence by which such facts could be proven." *Venlinio* v. *United States* (C. C. A. 7), 276 F. 12. The so-called best evidence rule, in its broadest scope was thus laid down in the early case of *Tayloe* v. *Riggs*, 1 Peters 591 (by Mr. Chief Justice Marshall):

> "The rule of law is, that the best evidence must be given of which the nature of the thing is capable;

> that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power."

While the more recent cases tend to limit the best evidence rule to cases where the contents of a writing are to be proved, the stenographer's transcript of testimony given before a Senate committee is placed at least upon a parity, so far as admissibility is concerned, with the recollection of any witness. *Meyers* v. *United States* (App. D. C.), 171 F. 2d 800, cert. den. 336 U. S. 912. On independent principles, defendant herein was entitled, by the proof offered, to offset the prejudicial effect of the prosecution's inaccurate evidence on the same subject. See *Bradley* v. *Adams Express Co.* (C. C. A. 6), 89 F. 2d 641.

POINT IV

The Senate Resolution and Certification pursuant to which defendant was prosecuted were restricted to the refusal "to answer certain questions," so that the affirmed counts of the indictment, predicated upon an alleged different default, should have been dismissed.

In accordance with a line of authoritative cases construing 2 U. S. C. A., Sections 192 and 194, including *Re Chapman,* 166 U. S. 161, *Jurney* v. *MacCracken,* 294 U. S. 125, and *United States* v. *Bryan,* 339 U. S. 323, it is established that the purpose of the statute was to provide "an alternative method of vindicating the authority of Congress to compel the disclosure of facts which were needed in the fulfillment of the legislative function" (Mr. Chief Justice Vinson in *United States* v. *Bryan, supra,* at p. 327). It is clear from these cases that the absence of a certificate authorizing the prosecution is matter of defense (*Re Chapman, supra,* at pp. 667-668). In other words, the appropriate

House must in the first instance determine that a contempt has been committed. Thereupon if it makes the appropriate certification, and not otherwise, the United States Attorney in the district where the supposed contempt was committed is authorized to institute a prosecution. A necessary corollary of the foregoing incontrovertible proposition is that the prosecuting officer may not in his judgment discover other putative contempts and make them a basis for enlarging the permissible scope of the prosecution he has been directed to commence.

The procedure for prosecutions for contempt of Congressional Committees is prescribed by 2 U. S. C. A., Section 194. That statute requires a Committee report to the appropriate House and certification of the statement of facts from the House to the appropriate prosecuting officer. In the instant case this procedure was followed by a report by the Committee to the Senate of the "fact of such failure or failures", accompanied by a legal opinion of its counsel, the adoption by the Senate after vote of a resolution citing defendant for contempt in his "*refusal * * * to answer certain questions*" and the certification to the United States Attorney of "the statement of facts aforesaid" (constituting such failure).

Thus, Senate Resolution 110 required a certification of "the refusal of Frank Costello *to answer certain questions* in response to subpoena duly issued, before the said special committee, *together with all the facts in connection therewith* * * * to the United States attorney" (Defendant's Exhibit K, R. 354). The report attached thereto stated further that by the defendant's refusal to answer the questions "the committee was prevented from receiving testimony and evidence," and that "*his persistent and illegal refusal to answer the aforesaid questions* [annexed thereto] deprived the committee of necessary and pertinent testimony and places this witness in contempt of the United States Senate." (Italics supplied.) The opinion of the Commit-

tee's chief counsel (Defendant's Exhibit K, R. 420-421), also limited the scope of contempt charged, and constituted formal advice and certification that defendant's refusal to answer questions was contemptuous in that the claim of privilege was arbitrary and fanciful rather than asserted in good faith.

Particularly in view of the fact that defendant eventually answered all questions except those with respect to which it was subsequently held that his claim of privilege was lawfully asserted, we submit that the sustained counts of the indictment constituted an unwarranted and unauthorized extension of the prosecution by the United States Attorney to acts or omissions which the Senate had never certified as constituting contempt. The law and the manner in which it has been consistently interpreted by the legislative department itself (see *First National Bank* v. *Missouri,* 263 U. S. 640, 658) compel the conclusion that it is no part of the United States Attorney's function to institute contempt proceedings for acts otherwise than as specifically directed by resolution of the appropriate House. This course is exemplified by various illustrative resolutions such as those in *Townsend* v. *United States,* 95 F. 2d 352, *Re Grunewald* (1952 H. Res. 602) and *Re Buchman* (1952 H. Res. 517).

A comparison of the indictment herein with the underlying resolution of the Senate unmistakably indicates that the only prosecution which the United States Attorney was empowered to set in motion was one predicated upon refusal of the defendant to answer specified questions, the answers to which were ultimately adjudicated to have been privileged, and that the enlargement of the indictment to embrace the affirmed counts was entirely unauthorized, so that a conviction based thereon would necessarily have to be reversed.

It might be inferred from the position taken by the Government, as well as from the opinion of the Court of Ap-

peals[12] that no deliberative action was required of the Senate, but that certification involved a mere ministerial function This interpretation is refuted by the resolution itself, which shows that it was adopted only after a vote of the Senate, a procedure which in turn was in accord with long-established and undeviating custom. The requirement and practice of deliberative action by the Senate was recognized by the Committee Chairman at the hearing attended by defendant on March 16th, the Chairman then making the following announcement:

> "I might explain the proceedings in connection with the matter of contempt before the Committee * * * This hearing is now being held by a subcommittee of the Senate Committee on Organized Crime, which is composed of five members. * * * The procedure will be that Senator Tobey and the chairman, as a committee of two, will make a recommendation to the whole committee, which will then be acted upon, and then that recommendation will be brought up on the floor of the Senate. *If voted*

[12] The Court of Appeals' opinion purported to construe 2 U. S. C. A. Sec. 194 and quoted it in full (see footnote, *infra*, p. vii). However, through some evident inadvertence, the statute was quoted in the form in which it existed prior to the amendments of 1936 and 1938. Those amendments made substantial changes, and it is possible that the Court's interpretation was influenced by the language of the statute prior to amendment. Thus the statute originally provided for reporting and certification whenever a witness "fails to testify." The amended statute, however, omits to specify such a default, but mentions three other types of default, namely, whenever a witness "fails *to appear* to testify," "fails to produce any books" or "fails to answer any question pertinent to the subject under inquiry." Moreover, the old statute gave as the condition for certification that "the *facts* are reported to either House," whereas the new law calls for the reporting and filing of *"a statement of fact constituting such failure."* As amended, the statute quite plainly requires a narrower limitation and definiteness of the precise offense reported for certification, and is more open to the construction of deliberative rather than ministerial action by the Senate.

> *favorably* it is then referred to the United States District Attorney for the district in which the violation took place, which would be Mr. Irving Saypol, the District Attorney for the Southern District of New York" (R. 337; italics ours).

The interpretation placed on the statute by the Court of Appeals would lead to anomalous situations. For instance, one could expect a contempt prosecution (as suggested in the brief of the United States Attorney in the Court of Appeals, p. 12), upon the basis of "a minority report;" or, indeed, despite the fact that the Senate had unanimously voted against it. It can be safely said that since the enactment of the present statute (2 U. S. C. A. Sec. 194), no contempt prosecution has been undertaken without the Senate or House approval after a vote thereon. Rightly so,—for it would be absurd to expect a prosecution for contempt without a majority vote to support it. It is equally absurd to contemplate the prosecution of particular contempt charges which—as herein—were never approved or even voted on by the Senate at all.

POINT V

The sentence imposed was in excess of the penalty provided in 2 U. S. C. A. Section 192.

Under Section 192 wilful default is made a misdemeanor, punishable by a fine of not more than $1,000.00 nor less than $100.00 and imprisonment of not less than one month nor more than twelve months. The sentence on the sustained counts (5, 6 and 8), was a total of eighteen months imprisonment, six months on each of counts 5 and 6 to run concurrently and one year on count 8; with total fines of $2,000.00, $1,000.00 on each of counts 5 and 8 and $100.00 on count 6, the latter fine to be remitted.

The authority of the Committee was thus defined in Senate Resolution 202:

> "* * * authorized and directed to make a full and complete study and investigation of whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law of the United States or of the State in which the transactions occur, and, if so, the manner and extent to which, and the identity of the persons, firms, or corporations by which such utilization is being made, what facilities are being used, and whether or not organized crime utilizes such interstate facilities or otherwise operates in interstate commerce for the development of corrupting influences in violation of law of the United States or of the laws of any state" (Gov. Ex. 2).

Each of the questions covered by the eleven counts in the indictment relates generally to the one subject matter under investigation, to wit,—crime. To be relevant, each question asked of the defendant by the Committee was required to relate generally to the same subject.

With but one subject under investigation there could be but one contempt. In fact, Section 192 defines only one offense,—that of contempt,—which may be committed by a wilful default in appearance or by a refusal to answer any pertinent question. Therefore, a sentence of more than $1000 fine and twelve months imprisonment was unauthorized and excessive.

The question here involved has not been passed on by this Court, but there are several cases in the courts below and in the State courts which give support to appellant's contention.

In *United States* v. *Yukio Abe*, 95 F. Supp. 991 (D. C., D. of Hawaii, 1951), the Court upheld the indictment

charging the defendant in a number of counts with refusing to answer each of the questions therein referred to, on the basis of Rule 8, Federal Rules of Criminal Procedure, 18 U. S. C. A. The Court added at page 992:

> "However, as the questions appear to be directed all to one subject of inquiry and the answers were simultaneous during the proceedings, and continuous acts, the indictment therefore charges only one alleged offense." (Citing cases.)

To like effect see *United States* v. *Emspak*, 95 F. Supp. 1012 (D. C., D. C., 1951). In *Maxwell* v. *Rives*, 11 Nev. 213 (1876), the defendant was held in contempt for refusing to answer a number of questions. The Appellate Court reversed on the ground that there was but one contempt. The Court said at page 221:

> "The statute concerning contempts is a penal statute, and must be strictly construed in favor of those accused of violating its prohibitions. Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same trial of the same issue cannot be deemed more than one contempt, no matter how many questions he may refuse to answer. Otherwise, there would be no limit to the amount in which he might be fined. But it is the manifest purpose of the statute to limit the amount of the fine to be imposed for any one contempt of court to the sum of five hundred dollars—a purpose that would be completely frustrated if the court, by repeating or multiplying questions, could multiply contempts. The district judge erred in finding that each separate refusal to answer a question was a distinct contempt; and in imposing fines which, in the aggregate, exceeded five hundred dollars, he exceeded his jurisdiction."

In *Fawick Airflex Co.* v. *United Electrical R. & M. Wkrs.*, 92 N. E. 2d 431 (Ohio App., 1950), the Court held that where the defendant refused to answer three questions, there was but one contempt and accordingly punishment should be restricted to one contempt.

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a Writ of Certiorari should be granted.

Dated: New York, N. Y., September 10, 1952.

Respectfully submitted

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